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UNLIMITED JURISDICTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

vs.

CITY OF BURBANK, ET AL.,

Defendants.

CASE NO. BC 422 252

[Assigned to the Hon. John L. Segal, Judge, Dept. "50"]

REPLY IN SUPPORT OF MOTION FOR ATTORNEYS FEES

Date: July 9, 2012
Time: 8:30 a.m.
Dept.: "50"

Action Filed: 9/22/09
FSC: February 29, 2012
Trial: March 5, 2012

6.29

TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that plaintiff William Taylor (hereafter "plaintiff") hereby files the following reply in support of plaintiff's Motion for Attorneys Fees.

Dated: 6/28/12

By: _____
Gregory W. Smith
Christopher Brizzolara
Attorneys for Plaintiff
WILLIAM TAYLOR

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

After mounting a defense to the instant litigation rivaled in size only by Germany's opposition to the Allied Force's invasion of the European theatre during World War II, defendant now contests the extensive work required to be performed over a nearly four year time period by two solo practitioners. Notably, defendant fails to address in any manner the undisputed evidence that three of the at least four law firms representing the defendant and/or its agents in this matter billed and have been paid a total of in excess of $1,000,000 in the defense of this case, allegedly at a lower hourly rate than requested by counsel for plaintiff herein. As set forth below, plaintiff's requested lodestar and multiplier in this matter are reasonable and fully supported by the facts, events, and circumstances surrounding this case.

II. ALL OF THE BILLING STATEMENTS OF PLAINTIFF'S COUNSEL ARE APPROPRIATELY SPECIFIC AND DO NOT CONTAIN ALLEGED "BLOCK BILLING" ENTRIES" WHICH JUSTIFY ANY REDUCTION IN THE ATTORNEYS FEES REQUESTED BY PLAINTIFF

A. The Verified Time Statements of the Attorneys, as Officers of the Court, Are Entitled to a Presumption of Credence

Defendant makes the unfounded and frankly scurrilous contention that plaintiff's attorneys engaged in "bill padding". Defendant's contention is meritless. Conspicuously absent from defendant's opposition is any reference to *Horsford v. the Board of Trustees of California State University* (2005) 132 Cal. App.4th 359. In *Horsford*, the court reversed the order of a trial court regarding an attorneys fee award in a FEHA case where the court found that the trial court abused its discretion in rejecting wholesale counsels' verified time records, stating that the verified time statements of the attorneys, as officers of the court, are entitled to a presumption of credence in the absence of a clear indication the records are erroneous. *Horsford, supra,* 132 Cal. App.4th 396 - 397.

The declarations supporting such time records and fee requests constitute "[s]worn testimony that, in fact, it took the time claimed" and "is evidence of considerable weight on the issue of the time required in the usual case." *Perkins v. Mobile Housing Board* (11th Cir. 1988) 847 F.2d 735, 738. Here, plaintiff's counsel verified time records are entitled to the same

presumption of credibility.

B. Defendant Concedes That Mr. Brizzolara Did Not Engage In Any "Block Billing" Or "Clerical Work"

Defendant concedes in its own chart (Opp., 15: 5 - 6) that Mr. Brizzolara's billing statements do not contain a single instance of a "block billing" time entry. Thus, defendant and this Court have been provided with specific billing entries setting forth to one tenth of an hour the time spent by Mr. Brizzolara for each of the legal services provided on this case.

C. Defendant's Claims of Alleged "Block Billing" By Mr. Smith and Ms. Francia Are Unfounded

In regard to Mr. Smith and Ms. Francia, defendant fails to set forth any items of alleged "block billing" by Mr. Smith or Ms. Francia that prevents defendant or this Court from being advised of the specific nature of the work performed. For example, defendant claims that such entries as Mr. Smith's entry of 10/31/11 of: "Prepare for Ramos Deposition/Review Documents" is somehow a "block billing. There is no necessity, and defendant has cited no authority, that Mr. Smith is required to set forth a description of each document reviewed by him in preparing for the deposition of defendant's former Mayor. Indeed, to require Mr. Smith to do so would take additional unnecessary time (which defendant would then claim was not compensable as "clerical time" or for some other unfounded reason), and would also require Mr. Smith to reveal his absolute attorney work product by disclosing which documents Mr. Smith believed were important enough to review and analyze in preparation for the deposition of Ms. Ramos.

Further, the description of the tasks performed by Ms. Francia set forth in her billing statements are quite detailed and contain sufficient information for defendant and this Court to analyze the reasonableness of the time spent by Ms. Francia in performing the services identified. Indeed, in regard to Mr. Smith and Ms. Francia, defendant fails to set forth a single alleged "block billing" entry in which defendant claims that either Mr. Smith or Ms. Francia spent excessive time in performing the services described in the entry.

D. Defendant's Claims Regarding The Time Spent and Number of Billing Entries of Mr. Brizzolara for Reviewing Correspondence and Memoranda From His Client Are False And Inaccurate As Evidenced By Defendant's Own Exhibit

In regard to Mr. Brizzolara, defendant claims that Mr. Brizzolara spent too much time

reviewing correspondence and memoranda from his client. Defendant inaccurately claims that Mr. Brizzolara's billing statements allegedly contain 93.01 hours reviewing and analyzing correspondence and memoranda from his client purportedly set forth in 40 billing entries. However, all of the time entries identified by defendant in its chart allegedly summarizing such services (Dec. of Frank, Ex. "C") total only 33.1 hours in a total of 17 billing entries. These tasks by Mr. Brizzolara were performed over a period of time extending from October, 2009 through June 2012 (a period of 31 months), so that by using defendant's own chart, Mr. Brizzolara spent approximately 1 hour a month and less than 15 minutes a week reviewing correspondence and memoranda from his client, which is hardly "highly suggestive of bill padding" as contended by defendant, and instead evidences exactly the opposite.

Unlike defendant and its battalions of attorneys and legal support staff, Mr. Brizzolara and Mr. Smith are solo practitioners. Unlike defendant and its attorneys, Mr. Smith and Mr. Brizzolara could not ethically contact any member of defendant's control group, and thus were required to rely in many instances upon the background, training, and experience of their client, the defendant's former Deputy Chief of Police, regarding the defendant's policies, practices, and procedures, as well as other information unique to the Burbank Police Department ("BPD").

Further, unlike defendant, Mr. Smith and Mr. Brizzolara did not have unlimited resources to employ legions of paralegals and alleged experts or consultants such as Mr. Gardiner, Mr. Stehr, and Mr. Lynch, among others, to review and summarize the extensive materials produced in this matter by defendant pursuant to Pitchess motions and other discovery vehicles. The trial court recognized this fact by specifically allowing in the Court's protective order signed August 11, 2011 that Mr. Taylor be provided with and allowed to review his own copy of the extensive materials produced by defendant pursuant to plaintiff's Pitchess motions. Not surprisingly, the bulk of the time spent by Mr. Brizzolara in reviewing and analyzing correspondence and memoranda from his client (19.2 hours) occurred after Mr. Taylor was provided with and allowed to review the extensive materials produced pursuant to plaintiff's Pitchess motion.

Plaintiff has not sought to bill defendant for any of the time he spent personally in reviewing and summarizing materials in this case. Had counsel for plaintiff performed all of the work

performed by Mr. Taylor on this case, plaintiff's attorneys fees would be exponentially higher. Thus, if anything, defendant received a "windfall" by Mr. Taylor actively participating in the litigation of his case, rather than plaintiff's counsel billing for reviewing and summarizing the vast amount of documents and other materials produced during discovery in this case that was undertaken by Mr. Taylor.

III. ALL OF THE TIME BILLED BY MR. SMITH PRIOR TO THE FILING OF THE COMPLAINT WAS REASONABLY NECESSARY AND CONTRIBUTED TO THE SUCCESS OF THIS LITIGATION

Defendant also makes the unfounded claim that plaintiff should not be allowed to recover the attorneys fees for the time spent by Mr. Smith on this matter prior to the filing of the complaint on September 18, 2009. Defendant's claim is specious. A review of Mr. Smith's time entries for the time period preceding September 18, 2009 indicated that Mr. Smith billed for such reasonable and necessary activities as: a) meeting with the plaintiff; b) preparing and performing legal research regarding the DFEH complaint filed by plaintiff against defendant, which was a necessary pre-requisite before plaintiff could file the Superior Court complaint alleging violations of FEHA; c) performing investigation regarding the merits of the case; d) corresponding with one of defendant's many counsel, Burbank Senior Assistant City Attorney Carol Humiston regarding the plaintiff; and; e) other tasks reasonably necessary prior to suing a public entity for violations of FEHA.

According to defendant's misplaced logic, Mr. Smith should have spent no time prior to filing the complaint investigating plaintiff's claims and preparing, filing, and serving a DFEH complaint regarding plaintiff's FEHA claims. Apparently, defendant has forgotten the requirements of *C.C.P.* Section 128.7 which require that:

"(a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ...

(b) By presenting to the court, whether by signing, filing ... a pleading .. an attorney... is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: ...

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(3) The allegations and other factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. ...

(l) This section shall apply to a complaint ... filed on or after January 1, 1995 ...".

Therefore, Mr. Smith was required by law to assure before signing and filing the complaint in this matter that an inquiry reasonable under the circumstances had been made to assure that the claims and other legal contentions in the complaint were warranted, and that the allegations and other factual contentions had or were likely to have evidentiary support. Defendant's contention that Mr. Smith's fees for pre-complaint filing activities should not be awarded should be summarily rejected.

IV. THE HOURLY RATES REQUESTED BY PLAINTIFF'S COUNSEL AND MS. FRANCIA ARE REASONABLE

Defendant also makes the unfounded claim that plaintiff's counsel have requested "inflated" hourly rates. Defendant fails to address that in the most recent FEHA case prior to this case tried to verdict and judgment by Mr. Smith and Mr. Brizzolara jointly in the fall of 2011 (*Bakotich, et al. v. City of Los Angeles*), wherein the Court awarded Mr. Smith and Mr. Brizzolara a reasonable hourly rate of $600.00 per hour for their services. Mr. Frank, who asserts that he was the defendant's "lead counsel" in this matter, admits that in his declaration that "$400.00 to $500.00 per hour is nearer to the rate that is consistent with the prevailing rate for comparable legal services through other counsel of comparable skill." (Dec. of Frank, 2: 7 - 8.) However, Mr. Frank offers no foundation for this opinion, or why his opinion is entitled to any weight whatsoever as opposed to the recent court ordered finding of the Honorable Judge Teresa Sanchez-Gordon.

Further, defendant offers no explanation why plaintiff's counsel should only be awarded the same hourly rate ($500.00 per hour) previously awarded by multiple judges in both state and federal court in 2007 to both Mr. Smith and Mr. Brizzolara. In the intervening five years the background, training, and experience of Mr. Smith and Mr. Brizzolara has increased, as evidenced by the at least eleven jury verdicts and/or judgments in excess of one million dollars, and at least three other substantial verdicts and/or judgments ranging between at least

$635,000 to at least $995,000 in employment law actions obtained by Mr. Smith and/or Mr. Brizzolara subsequent to 2007. Since being awarded a $500.00 reasonable hourly rate in 2007, Mr. Smith and/or Mr. Brizzolara have obtained jury verdicts and/or judgments in employment law cases totaling approximately $20,000,000. Plaintiff's counsel assert that a modest increase in their hourly rate of only $20.00 per hour per year over the last five years is quite reasonable, and are willing to match their trial results in the last five years with any other plaintiff's attorneys practicing in the field of employment law in Southern California during that same time frame.

A. The Fees Charged And Paid To Defendant In This Matter Support Plaintiff's Requested Hourly Rates As Well As A Multiplier

Mr. Frank states in his declaration that the rates requested by plaintiff's counsel are double the rates paid to defense counsel for defending this case. Therefore, while Mr. Frank's declaration is evasive as to the exact hourly rates paid to any of defendant's multiple counsel in this matter, one-half of $600.00 per hour is $300.00 per hour. As established by Ex. 3 to the declaration of Mr. Smith, defense counsel in this case have been paid at least $1,015,023.60 in regard to the defense of this matter through March 31, 2012. These fees appear not to include the additional time spent by defense counsel in unsuccessfully conducting the trial of this case, in unsuccessfully moving for new trial/jnov, and the other post-trial work engaged in by defense counsel.

The fees of defense counsel through March 31, 2012 of $1,015,023.60 divided by the rate of $300.00 per hour reveal that defense counsel has billed for at least 3384 attorney and/or paralegal hours in defending this case. Defense counsel would presumably agree that this amount of hours was "reasonably necessary" to properly litigate this case, even though defendant was the losing party in this matter. Yet defendant has the temerity to challenge the 1436 attorney hours spent by plaintiff's counsel in prosecuting and prevailing on in this case.[1]

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[1] While defendant has failed to address why it was necessary for defense counsel to bill more than twice as many hours as plaintiff's counsel, one reasonable inference is that plaintiff's counsel utilized their extensive experience in litigating cases involving employment

If 3384 attorney hours were necessary to defend and lose this action, then defendant is hard pressed to argue that it would not have been reasonable for plaintiff's counsel to have spent the same amount of hours in prosecuting and winning the action.

At the rate of $600.00 per hour the reasonable lodestar of plaintiff's counsel had they spent the same amount of time as defense counsel would be $2,030,400. At the rate of $500.00 per hour (which even defense counsel admits is reasonable) the reasonable lodestar of plaintiff's counsel had they spent the same amount of time as defense counsel would be $1,692,000.[2] Thus, the lodestar amount requested by plaintiff's counsel ($836,532.50) is less than ½ of the reasonable lodestar of plaintiff's counsel had they spent the same amount of time as defense counsel. Moreover, plaintiff's requested lodestar amount ($836,532.50) is even less than the admitted amount of attorneys fees paid to defense counsel as of March 31, 2012 ($1,015,023.60). Defendant has proffered no legitimate reason why its own counsel should be paid more in attorneys fees for losing this case than plaintiff's counsel should be paid for winning the case.

Further, defense counsel had and have no contingent risk in defending this case. Win, lose, or draw, defense counsel was assured of being paid for their services on this case, and paid for their services contemporaneously or within a relatively short time of providing such services. In contrast, plaintiff's counsel have not been paid dime one this case in fees or costs, and if defendant appeals the case, will in all likelihood not be paid dime one in fees or costs for at least 11/2 to 2 years while defendant attempts to overturn the judgment herein in the appellate courts. If Mr. Frank and Ms. Savitt had defended this case on the basis that they would only be paid if they won the case, and then only years later after all appeals from the

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claims by law enforcement officers against public entities to better focus their efforts and avoid unnecessary and/or duplicative legal services in handling this matter, which supports plaintiff's request for both a higher rate than defense counsel and a multiplier.

2/ As such, plaintiff's requested attorneys fees with a multiplier fall within the range of a reasonable hourly rate of $500.00 - $600.00 per hour multiplied by the amount of time that defense counsel billed for unsuccessfully defending this case. As such, plaintiff's total requested attorneys fees of $1,753,065 are reasonable under any method of calculation.

judgment had been exhausted, then there can be no doubt that their hourly rate would not be $300.00 per hour, but would be at least as much as the hourly rate of $600.00 per hour requested by plaintiff's counsel.

Additionally, by deciding to proceed to trial, defendant and its counsel believed that they had at least a 50% chance of winning this case. As such, had defense counsel been representing the plaintiff, instead of the City, there can be no doubt that they would have required the plaintiff to pay an hourly rate of at least double the alleged $300 per hour rate they claim to have charged, and would have charged at least $600.00 per hour.

B. The Facts, Events, and Circumstances Of This Case Support Plaintiff's Requested Hourly Rates As Well As A Multiplier

Defendant makes the inaccurate claim that this was "a garden variety employment case". (Opp., 12: 26 - 28.) If this is true, then why did defendant: a) require the services of: 1) at least four law firms (Burke, Williams, et al., Ballard, Rosenberg, et al., Stone & Busailah, and Liebert, Cassidy, et al.); 2) multiple attorneys from its own City Attorney's office; 3) attorneys Merrick Bobb and Debra Wong-Yang; b) expend in excess of $1,000,000 to the first three law firms listed above, and in excess of $330,000 to the Liebert, Cassidy, et al. firm; c) need the services of an "expert attorneys" costing more than $1,000,000 from Merrick Bobb and Debra Wong-Yang regarding at the issues involved in this case; and d) require the services of at least three alleged police practices experts and/or consultants (James Gardiner, Tim Stehr, and Patrick Lynch)? The answer to this question is obvious - defendant viewed the case as a complicated and potentially explosive case involving competent plaintiff's counsel from the get-go and spent literally millions of dollars attempting to "hide the ball" and manufacture a defense to its illegal retaliation against plaintiff. As set forth in the attached declaration of Christopher Brizzolara, counsel for plaintiff have been awarded multipliers in cases far less unduly complicated by the tactics of defendant and its counsel and requiring far less time and effort and the concomitant loss of the ability to take on other lucrative legal matters.

Therefore, as set forth in the attached declaration of Mr. Brizzolara, a multiplier is

justified based upon the factors set forth by the California Supreme Court in *Ketchum v. Moses* (2001) 24 Cal.4th 1122 and by the Ninth Circuit in *Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F.2d 67.

V. PLAINTIFF'S REQUESTED FEES SHOULD NOT BE APPORTIONED

Defendant contends that plaintiff's attorneys fees should be reduced by 1/3 apportioned to the plaintiff's cause of action based upon *Labor Code* Section 1102.5. Defendant's contention is unfounded. First, plaintiff's counsel have specifically attempted not to submit billing for the time spent, if any, solely related to the *Labor Code* Section 1102.5 claim. Defendant is unable to set forth any attorneys fees sought by plaintiff that were solely related to the *Labor Code* Section 1102.5 cause of action other than the litigation surrounding plaintiff's Pitchess motions. However, plaintiff's initial Pitchess motion sought the documents that allegedly supported the termination of plaintiff for purportedly obstructing the Portos I investigation and providing untruthful statements in Portos II, which were the grounds specifically alleged by defendant as the legitimate non-retaliatory reasons for terminating plaintiff. Plaintiff's second set of Pitchess motions included a Pitchess motion which was specifically directed to obtaining information and evidence in support of plaintiff's claims that he been retaliated against for reporting and opposing sexual harassment and sexual discrimination in violation of FEHA.

The *McDonnell Douglas* burden-shifting framework applies in FEHA retaliation cases. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044. Once, as here, the plaintiff has established a prima facie case, the employer must then articulate a legitimate, nonretaliatory reason for each of the adverse employment actions taken. If the defendant is able to do so, then the plaintiff must prove the employer's reason is a pretext. Thus, plaintiff's Pitchess motions were directly related to the prosecution of plaintiff's FEHA claims, including the issue of pretext.

Further, the litigation of plaintiff's FEHA claims were and are inextricably intertwined with the litigation of plaintiff's *Labor Code* Section 1102.5 claims. Plaintiff's reporting and/or protesting activities that violated FEHA were and are also activities protected by *Labor Code*

Section 1102.5, since violations of FEHA are violations of state statutes. As held in *Downey Cares v. Downey Community Development Com.* (1987) 196 Cal. App. 3d 983, 997.

> "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised."

Further, even where a plaintiff prevails on only one theory is not dispositive. As stated in *Sokolow v. County of San Mateo* (1989) 213 Cal. App. 3d 231, 250:

> "Attorneys generally must pursue all available legal avenues and theories in pursuit of their clients' objectives; it is impossible, as a practical matter, for an attorney to know in advance whether or not his or her work on a potentially meritorious legal theory will ultimately prevail." See also, *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 423 - 425.

Here, In light of the strong interrelationship between plaintiff's claims, the Court should not apportion more than 2% of plaintiff's requested attorneys fees.

VI. DEFENDANT HAS CITED NO AUTHORITY TO SUPPORT THE IMPOSITION OF A NEGATIVE MULTIPLIER, AND ARE NOT ENTITLED TO CONDUCT ANY POST-JUDGMENT DISCOVERY

Defendant also asserts that a "negative multiplier" should be imposed upon the attorneys fees requested, yet failed to set forth a single case in which a court has imposed a negative multiplier upon a successful plaintiff in a FEHA case. If defense counsel is seriously contending that a negative multiplier is justified in this case, then defense counsel should start by returning to the taxpayers of Burbank a substantial portion of the attorneys fees they have been paid to lose the trial of this matter.

Further, defendant has failed to cite any case supporting that discovery or the appointment of a referee (let alone one paid by plaintiff) is appropriate in a case where attorneys fees are sought by a prevailing plaintiff in a FEHA case. Defendant has failed to address in any respect the requirements of *C.C.P.* Section 2036.010, et seq. regarding conducting discovery post-judgment and pending appeal. Defendant has failed to timely bring any motion pursuant to *C.C.P.* Section 2036.010, et seq., and defendant's request for discovery and appointment of a referee should be summarily denied.

Dated: 6/28/12

Respectfully Submitted:

By: _____

Gregory W. Smith
Christopher Brizzolara
Attorneys for Plaintiff
WILLIAM TAYLOR

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years of age, and am not a party to the within action; my business address is 9100 Wilshire Boulevard, Suite 345E, Beverly Hills, California 90212.

On the date hereinbelow specified, I served the foregoing document, described as set forth below on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes, at Beverly Hills, addressed as follows:

DATE OF SERVICE : June 29, 2012

DOCUMENT SERVED : **REPLY IN SUPPORT OF MOTION FOR ATTORNEYS FEES**

PARTIES SERVED : **SEE ATTACHED SERVICE LIST.**

XXX (BY FEDERAL EXPRESS) I caused the aforesaid document(s) to be delivered to Federal Express either by an authorized courier of Federal Express or by delivery to an authorized Federal Express office in a pre-paid envelope for overnight delivery to the addressee(s) as shown on the Service List.

XXX (BY ELECTRONIC MAIL) I caused such document to be electronically mailed to **Christopher Brizzolara, Esq.** at the following e-mail address: samorai@adelphia.net.

XXX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

EXECUTED at Beverly Hills, California on June 29, 2012.

Selma I. Francia

SERVICE LIST

WILLIAM TAYLOR v. CITY OF BURBANK
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC 422 252

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